No. 5373

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 4 A

E. CLEMENS HORST COMPANY (a corporation),
Plaintiff in Error,

vs.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY (a corporation),
Defendant in Error.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PLAINTIFF IN ERROR.

BROBECK, PHLEGER & HARRISON,
RIDGWAY, JOHNSON & KENDALL,
Attorneys for Plaintiff in Error.

HERMAN PHLEGER,
MAURICE E. HARRISON,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 5373

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. CLEMENS HORST COMPANY (a corporation),
Plaintiff in Error,

vs.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY (a corporation),
Defendant in Error.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PLAINTIFF IN ERROR.

It is the purpose of this memorandum to state as briefly as possible the contention of the Horst Company that the policy by its terms covered the accident to the Rogans. The preliminary point, that the Rogans were employees at the time of the accident, is discussed at length in our brief at pages 18-35.

I. MEANING OF THE POLICY.

The policy provides (Tr. p. 17) that the assured will be indemnified

> "against loss by reason of the liability imposed by law upon the assured for damages on account

> of bodily injuries * * * suffered * * * by any employee or employees of the assured *while at or about the work of the assured* described in Warranty 4, which for the purpose of this insurance shall include all operations necessary, incident or appurtenant thereto, or connected therewith."

"The work of the assured" therefore includes at least all work described in Warranty 4, and all operations of the assured incident thereto or connected therewith. But with these limitations we need not be concerned, because the parties later agreed (Tr. p. 25) by an endorsement on the policy that

> "It is hereby understood and agreed that it is the intent of this policy to cover all the operations of the assured in Oregon, whether or not such operations are declared under Warranty 4."

These broadening clauses make it clear that the word "work" as used in the opening clause of the policy, is not used in the sense of "labor" or "service", but rather in the sense of "business" or "operations". It is the work "of the assured" which the employee must be about. Whatever the phrase "about the work of the assured" might have meant if it stood alone, the following clause and the special endorsement make clear the intent that all that was required was that the employee, at the time of the accident, be "about the operations" of the plaintiff in error.

The contract requirement, then, is simply that the injured employee shall have been *"at or about any operations of the assured in Oregon"*. (It is of course necessary to change the conjunctive "all" to the disjunctive "any" in order to express the mean-

ing intended.) It is clear that this constitutes a strictly accurate statement of the exact meaning of the policy. The court, it seems to us, must treat this case as if the policy had been rewritten to include the italicized language.

The question, therefore, is whether the Rogans were "at or about any operations of the assured in Oregon". We are immediately faced with an ambiguity resulting from the use of the words "at or about". They obviously have no definite and clear-cut meaning, standing by themselves. They require some kind of connection between the employee and the operations of the assured. Defendant in error says they require a very close connection, an actual engaging in labor, a picking-up of the tools of employment. But what was the purpose of the policy?

> "To indemnify the assured named in the warranties hereof against loss *by reason of the liability imposed by law* upon the assured for damages on account of bodily injuries * * * suffered * * * by any employee or employees of the assured while at or about 'any' operations of the assured in Oregon." (Tr. p. 17.)

The meaning of the phrase "at or about the operations of the assured" should be determined in the light of the controlling purpose to indemnify the employer against "the liability imposed by law". The parties must have had in mind at least the two species of liability usually imposed upon employers on account of injuries to their employees: the one by virtue of the common law of negligence as applied to the relation of master and servant, the other by virtue of the usual statutory workingmen's compensation acts. That

these parties *did* have in mind liability for workmen's compensation is evidenced by one of the endorsements attached to the policy. (Tr. pp. 27, 28.) The rule is well settled that the policy must be construed most liberally in favor of the assured. The defendant in error wrote the policy; it contemplated a possible liability under the Workmen's Compensation Act; and yet in its definition of the connection to be required between the injury of the employee and the operations of the assured, it used a loose and equivocal expression,—it said that the employee must be "at or about the operations of the assured". Can this court say that the liability against which the assured was to be indemnified is *narrower* than that covered by the workmen's compensation acts? If it leans in favor of the assured, as it must, it can hardly avoid saying that the liability contemplated is broader. But it is enough to say that it is coextensive.

Aside from the doctrine of liberal interpretation of insurance policies, and aside also from the dominant purpose to indemnify against legal liability (and therefore against the contemplated liability for compensation), a comparison of the phrase used in the policy ("at or about the operations of the assured") with the liability clause common to compensation acts ("arising out of and within the course of the employment") shows that the former is at least as broad as the latter.

It follows that the decisions under the compensation acts which define particular activities as being "within the course of the employment" and as "arising out

of the employment" will furnish proper guidance in determining the scope of the present policy.

II. AUTHORITIES UNDER THE WORKMEN'S COMPENSATION ACTS.

The facts of this case bring it within a well-established line of authorities arising under the compensation acts. The cases are collected at 10 A. L. R. 169, 21 A. L. R. 1223, 24 A. L. R. 1233, and 1928 A. L. R. Blue Book of Supplemental Decisions, pages 323-4. The rule is stated thus:

> "It is generally held that where transportation is furnished by an employer as an incident of the employment, an injury suffered by the employee going or coming in the vehicle so furnished by the employer, and under his control, arises out of and is within the course of the employment, within the meaning of the Workmen's Compensation Act." (10 A. L. R. 169.)

This well settled rule does not apply to a case where the transportation is furnished by the employer, not for the purpose of taking the employee to or from work, but for some purpose personal to the employee and unconnected with the employer's operations. The distinction between the two classes of cases is illustrated by the case most relied on by defendant in error—*Boyle-Farrell Land Company v. Standard Accident Insurance Company*, 24 Fed. (2nd) 55. In that case the suit was on an employer's liability policy. The employee was travelling at the time of the injury upon the employer's logging train. He had been ill and had not been working for some time, and

was on his way back to the logging camp from a visit to the company's doctor at a neighboring town. The policy specifically referred to the situation where employees were riding on logging trains and provided that it should cover "employees * * * riding on logging trains *to and from work*". The transportation involved in that case was not to or from work, but was for the private and personal purposes of the employee in connection with his illness, and the court naturally reached the conclusion that the accident was not covered by the policy.

The same distinction, between transportation to and from work and transportation for the employee's personal benefit, is to be found in the compensation cases.

For instance, in *Norwood v. Tellico River Lumber Company,* 146 Tenn. 682, 244 S. W. 490, 24 A. L. R. 1227, the court was constrained to deny a recovery under the act because "the undisputed evidence shows that plaintiff was not returning to or from his work at the time he sustained the injury complained of", although he was riding on the employer's train, and although it was admitted that

> "Where transportation is furnished by an employer as an incident of the employment, an injury suffered by the employee while going to or returning from his work in the vehicle so furnished by the employer and under his control, arises out of and is within the course of the employment, within the meaning of the Workmen's Compensation Acts."

It is clear, therefore, that even if the policy in the *Boyle* case, as in ours, had been intended to indemnify

against liability incurred under the Workmen's Compensation Act, a recovery could not have been had, because the employee was not on his way to or from work.

But in our case the Rogans were on their way to work. Getting to work was not an incidental or a remote object of their trip, it was the immediate object. The Horst Company had advertised for 2000 hop pickers, all to start work on September 1st. Obviously they could not all be transported to the ranch on the same day. It was necessary to spread the mobilization over two or three days. Plaintiff therefore advertised that they would be transported free of charge to the ranch between August 29th and August 31st. The Rogans came on August 29th. To argue that the transportation afforded them on that day was not a trip *to work,* directly and exclusively, is to attribute to plaintiff in error a philanthropy which it hastens to disclaim.

In *Saba v. Pioneer Contracting Company,* 131 Atl. 394 (1925), the employee was injured while on his way to work in a truck furnished by the employer for the purpose of conveying his employees. The court held that the accident occurred in the course of employment, and said:

> "It is true that the actual employment of these workmen for stated pay did not begin until they arrived on the job and began work, but when an employee mounted the truck at the employers' direction to go to the job, in accord with the employers' contemplation of what his conduct would be in going to the place of the job, he came within the zone of his employment as contemplated by his employers. The mere fact that the time spent

> on the truck was not time for which by his contract of employment he was paid is immaterial, in view of the facts found."

In *Jett v. Turner* (Ala.), 110 So. 703, the employee was injured while being conveyed home from work by his employer. He was paid by the hour, for the time he spent working. The court said:

> "With impressive unanimity the courts of other states throughout the Union have declared that an employee, injured while being transported by his employer to and from his place of work as a part of the contract of employment, is within the protection of the workmen's compensation laws. * * *
>
> "While the employee is being transported by the employer pursuant to the contract of employment, it cannot be questioned they have entered upon the day's work wherein mutual duties of employer and employee are presently being performed. The pay of the employee has begun, not in wages, but in service incident to the mutual relation created by contract; his going to or from the place of work is incident to his services as per contract; the hazard of the moment is directly due to relation of employer and employee; he is at a place where he is called upon to be, where of right he may be in the performance of contractual duty."

It would be superfluous to carry this discussion further. The guiding principle of the decisions is clear, and equally clear is their application to the case at bar.

III. THE CALIFORNIA CASES.

The California law has a peculiarity of its own that puts the California cases in a class by themselves. In

order to recover under the act the employee is required to have been "*performing service* growing out of and incidental to his employment". (Stats. 1917, p. 831, Sec. 6a, 2.) Counsel interprets the policy in suit in almost the same language,—"they must * * * have actually entered upon the performance of their duties as hop pickers or work incidental to hop picking". (Brief of Defendant in Error, p. 18.) Since admittedly the Rogans were employed to pick hops, it is clear that counsel's language and the language of the California statute are *identical in effect.* But what of the cases?

In *Dominguez v. Pendola,* 46 Cal. App. 220, the employee was being carried on his employer's truck to the place of work, and was thrown off while going around a turn. A recovery was allowed.

In *Judson Mfg. Co. v. Industrial Accident Commission,* 181 Cal. 300, the employee was walking along a path provided by the employer and was injured outside the employer's gate. He was held to be "*performing services*" for the employer.

And in *Harlan v. Industrial Accident Commission,* 194 Cal. 352, where an employee was being transported to work in his employer's automobile, a recovery was allowed.

But the underlying principles are most thoroughly discussed in *State Compensation Insurance Fund v. Industrial Accident Commission,* 194 Cal. 28. Here a maid employed at the Fairmont Hotel and living at the hotel was injured while leaving the hotel building for a personal errand on her day off. The court held

that she was entitled to recover compensation and cited the case of *Larson v. Industrial Accident Commission,* 193 Cal. 406. There ranch hands were compelled to sleep in a bunk house provided by the employer and it was held that they were in the course of their employment and performing a service incident to their employment at the time when they had completed their work and were in the bunk house waiting for supper. The court said further:

> "In the Larson case the employees were held to be in the course of their employment and *performing a service* incidental thereto when sleeping in a bunkhouse, because the situation of the ranch and the nature of their employment practically precluded them from living elsewhere. In the instant case, neither the situation of the hotel nor the nature of the employment demanded residence at the hotel, but the written contract under which the employee was working provided for such residence as a partial payment for services. In the one case there was a compulsion of circumstances, and in the other, as we have stated, the compulsion of a written contract.
>
> "Applying the language of the Associated Oil Company case, supra, i. e.: 'When the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer,' and applying, by analogy, the case of Larson v. Industrial Acc. Com., supra, to the facts of the instant case, we think the employee was in course of her employment and performing services growing out of and incidental to such employment when she was leaving her place of employment (her residence, also, by reason of her contract of employment, and furnished to her as part compensation

> for her labor under such contract) by the exit designated by the employer, to enjoy her 'day off' —an intermission in her labor contemplated by said contract of employment."

Thus defendant in error is liable even under the strict construction contended for by its counsel. While the California cases are not binding on this court, they are as persuasive as any of the other cases that have been cited. In order to defeat a recovery in this case it would be necessary to repudiate the long established rule established by a consistent line of decisions in this jurisdiction.

CONCLUSION.

The reasoning of the Workmen's Compensation cases applies with full force to the interpretation of the policy involved in this case.

Independent of these decisions, however, if the court had before it only the words of the policy, requiring that the employees should be "at or about the operations of the assured", the case would seem to come clearly within its terms. The mobilization of this large force of employees at the plaintiff's ranch and their transportation over a period of three days preceding the commencement of the harvest was clearly an "operation of the assured".

The policy in the *Boyle-Farrell* case, upon which counsel for defendant in error relies, was not only restricted to cases of transportation of employees "to and from work", but was far more limited than the

policy here involved in the definition of the "work" in which the employee was required to be engaged. In our case the term "work" was extended and broadened so as to include "all operations of the assured".

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
May 28, 1928.

BROBECK, PHLEGER & HARRISON,
RIDGWAY, JOHNSON & KENDALL,
Attorneys for Plaintiff in Error.

HERMAN PHLEGER,
MAURICE E. HARRISON,
Of Counsel.